



October 9, 2014

Horst Greczmiel
Associate Director for National Environmental Policy Act Oversight
The Council on Environmental Quality
722 Jackson Place N.W.
Washington, D.C. 20503

Submitted via Federal eRulemaking Portal

RE: Comments on Draft Guidance on Effective Use of Programmatic National Environmental Policy Act Reviews; 79 Fed. Reg. 50578 (August 25, 2014)

Dear Mr. Greczmiel:

On August 25, 2014, the Council on Environmental Quality (“CEQ”) issued draft guidance on the effective use of programmatic National Environmental Policy Act (“NEPA”) reviews (hereinafter referred to as “the draft guidance”). As the holder of an existing oil shale Research, Development and Demonstration lease in Uintah County in northeastern Utah within the Bureau of Land Management’s Vernal Field Office jurisdiction, and as a previous commenter on the Bureau of Land Management’s Oil Shale and Tar Sands Leasing Programmatic Environmental Impact Statement (“PEIS”), Enefit American Oil (“Enefit”) has a strong interest in the CEQ’s development and use of programmatic NEPA documents. Enefit respectfully submits these comments and requests that this letter be included in the administrative record for this matter.

I. INTRODUCTION

The stated goal of the draft guidance is “to encourage a more consistent approach to programmatic NEPA reviews so that the analyses and documentation will allow for the expeditious and efficient completion of any necessary tiered reviews.” 79 Fed. Reg. 50578 and 50579 (August 25, 2014). Enefit understands that the draft guidance is not intended to supplant or revise the CEQ’s regulations for implementing the procedural provisions of the NEPA (40 Code of Federal Regulations Parts 1500-1508), but rather to provide more clarity and specific examples for how best to implement the NEPA. The use of programmatic environmental assessments (“PEA”) and PEIS can be a valuable tool in ensuring good planning and decision-making is conducted by Federal agencies.

Enefit supports the CEQ’s efforts to make the NEPA review process more efficient and effective, and thus offers the following detailed comments to further improve the NEPA process for agencies, project proponents, and the public.

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II. SPECIFIC COMMENTS

Section III of the draft guidance indicates that “[a]gencies usually benefit by asking two questions when determining whether to prepare a programmatic NEPA review: (1) could the PEA [programmatic environmental assessment] or [programmatic environmental impact statement] PEIS be sufficiently forward looking to contribute to the agency’s basic planning of an overall program?; and (2) does the PEA or PEIS provide the agency the opportunity to avoid ‘segmenting’ the overall program from subsequent individual actions and thereby avoid unreasonably constricting the scope of environmental regulation?” While these two questions are certainly relevant, a third could also be considered: (3) Does the PEA or PEIS create a potential future conflict with site- or topic-specific NEPA analyses that may need to be conducted? While this question is related to the first two, the answer could be sufficiently different, requiring the PEA or PEIS to be crafted in a such a manner as to avoid future conflicts. It may be beneficial for the CEQ to consider how best to evaluate potential future conflicts and to provide examples of what may constitute a conflict, such that agencies do not waste valuable time and resources developing a PEA or PEIS that has no future utility.

In Section IV(A)(3) of the draft guidance, the CEQ discusses the classification of both connected and cumulative actions when considering the proposed action for a PEA or PEIS, and provides examples of each. The inclusion or limitation of connected and cumulative actions in a programmatic analysis is difficult, as the interpretation of each is discretionary and the reach can be far. The CEQ should provide additional clarity, as well as several additional examples, as to how an agency should determine which actions are connected or cumulative and how they should be treated in a programmatic document. Ideally, the final guidance should include a discrete list of questions to be answered by an agency (i.e. a “test,” of sorts) that will indicate which actions, if any, should be considered connected or cumulative. In order to limit the scope of the PEA or PEIS to a manageable, effective, and efficient level, while at the same time having the document retain its future relevance for tiering, connected and cumulative actions must be clearly defined and evaluated.

Congruent with the connected/cumulative issue, and particularly important to Section IV(B)(2) regarding public engagement, would be to clearly define those actions, topics and/or resources that *are not* being addressed in the PEA or PEIS. In order for programmatic documents to improve efficiency in future NEPA analyses, it is important for users to fully understand what has, and has not, been evaluated. Special attention should be paid to providing information to the public on *how* the PEA or PEIS is being used now, and is anticipated to be used in the future. Further, special attention should be paid to providing direction on what comments are relevant during PEA or PEIS development, and what comments are not relevant and/or should be deferred for future analyses. The draft guidance, while acknowledging this point and issue, should provide clear direction for agencies on how and when to implement these public engagement considerations, including providing examples.

Finally, Section V(B) of the draft guidance provides extensive direction to agencies on how to utilize tiering, which is acknowledged by the CEQ as “[o]ne of the main advantages of a programmatic NEPA review”. One of the main obstacles to effective use of programmatic NEPA

documents is improper tiering. The draft guidance would benefit from additional clarity, detail, and examples regarding what specifically constitutes an adequate programmatic review, as well as an adequate tiered review. While challenging, this appears to be the greatest opportunity for recognizing the benefit of programmatic guidance or, conversely, the greatest potential for ensuring that programmatic documents continue to suffer from under-utilization. Appropriate tiering can serve to meet the state goal of improving efficiency in the NEPA process, while inappropriate tiering will only serve to create duplicative work and consumption of resources, all the while introducing yet another source of potential NEPA litigation.

III. CONCLUSION

Enefit commends the CEQ for taking action to make the NEPA process more efficient and cost effective. The CEQ's draft guidance regarding programmatic NEPA documents seeks to make the NEPA review process more useful for agencies, project proponents, and the public in decision-making. While the draft guidance generally accomplishes this objective, it would benefit from additional clarity and examples under a number of points, namely connected/cumulative actions, issues to be covered/not covered, and implementation of tiering. Additionally, prior to issuance of final programmatic NEPA guidance, Enefit recommends the CEQ conduct a series of informational sessions, webinars, or similar to more clearly explain how the direction provided in the draft guidance would work in practice, both for Federal government agencies as well as the public. It is likely that these sessions would generate more relevant, practical, "real world" concerns with the guidance that could be incorporated into the final version.

Should you have any questions regarding these comments, please feel free to contact me at 801.363.0206 or ryan.clerico@enefit.com.

Sincerely,



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